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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 CITIMORTGAGE, INC.,

8 Plaintiff(s),

9 v.

10 MISSION HILLS HOMEOWNERS
11 ASSOCIATION, et al.,

12 Defendant(s).

Case No. 2:16-CV-374 JCM (CWH)

ORDER

13
14 Presently before the court is plaintiff CitiMortgage, Inc.'s ("CMI") motion for summary
15 judgment. (ECF No. 37). No responses were filed to this motion.

16 Also before the court is defendant SFR Investments Pool 1, LLC's ("SFR") motion to
17 certify a question of law. (ECF No. 50). CMI filed a response (ECF No. 55), and SFR filed a
18 reply (ECF No. 56).

19 Also before the court is defendant SFR's motion for partial summary judgment. (ECF No.
20 58). No responses were filed to this motion.

21 **I. Introduction**

22 This case involves the HOA foreclosure sale of the real property at 2305 W. Horizon Ridge
23 Parkway #3311, Henderson, Nevada. (ECF No. 1).

24 On January 13, 2012, Mission Hills Homeowners Association (the "HOA") recorded a
25 notice of delinquent assessment (lien), indicating an outstanding liability of \$4,620.00. (ECF No.
26 37-1).

1 On April 4, 2012, the deed of trust on the property, produced in relation to the original
2 purchase loan, was assigned to CMI.¹ (*Id.*). Bank of America, N.A. as successor by merger to
3 BAC Home Loans Servicing, LP (“BANA”) acted as servicer of the loan. (ECF No. 1).

4 On May 8, 2012, the HOA recorded a notice of default and election to sell, indicating an
5 amount of \$5,770.00. (ECF No. 37-1). Thereafter, on November 19, 2012, the HOA recorded a
6 notice of trustee’s sale, asserting a sum due of \$8,002.55. (*Id.*). Finally, the HOA’s agent, Alessi
7 & Koenig, recorded a trustee’s deed upon sale on February 26, 2013, that recognized SFR’s
8 purchase of the property. (*Id.*).

9 On February 24, 2016, CMI filed the underlying complaint in this case, alleging: (1) quiet
10 title and declaratory judgment against all defendants; (2) breach of NRS 116.1113 against the HOA
11 and Alessi; (3) wrongful foreclosure against the same; and (4) injunctive relief against SFR. (ECF
12 No. 1).

13 On May 25, 2016, SFR filed a counterclaim against CitiMortgage, Inc. requesting
14 declaratory and injunctive relief in connection with a quiet title claim on the property (ECF No.
15 22).

16 II. Legal Standard

17 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
19 show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment
20 as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate
21 and dispose of factually unsupported claims” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–
22 24 (1986).

23 For purposes of summary judgment, disputed factual issues should be construed in favor
24 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be
25 entitled to a denial of summary judgment, the non-moving party must “set forth specific facts
26 showing that there is a genuine issue for trial.” *Id.*

27
28 ¹ Although the language of the April 4, 2012, assignment of deed of trust is somewhat
ambiguous, the May 6, 2013, re-recording clarifies that CMI was the interest holder at that time.
(ECF No. 37-1).

1 In determining summary judgment, the court applies a burden-shifting analysis. “When
2 the party moving for summary judgment would bear the burden of proof at trial, it must come
3 forward with evidence which would entitle it to a directed verdict if the evidence went
4 uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480
5 (9th Cir. 2000). Moreover, “[i]n such a case, the moving party has the initial burden of establishing
6 the absence of a genuine issue of fact on each issue material to its case.” *Id.*

7 By contrast, when the non-moving party bears the burden of proving the claim or defense,
8 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
9 element of the non-moving party’s case; or (2) by demonstrating that the non-moving party failed
10 to make a showing sufficient to establish an element essential to that party’s case on which that
11 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
12 party fails to meet its initial burden, summary judgment must be denied and the court need not
13 consider the non-moving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
14 60 (1970).

15 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
16 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
17 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
18 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
19 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
20 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
21 630 (9th Cir. 1987).

22 **III. Discussion**

23 As an initial matter, a failure to respond to a motion for summary judgment is not a
24 sufficient condition for that motion’s success. *See* LR 7-2(d); *see also Heinemann v. Satterberg*,
25 731 F.3d 914, 917–18 (9th Cir. 2013). A district court may grant an unopposed motion for
26 summary judgment only if the movant’s filings satisfy the summary judgment standard. *See White*
27 *v. Aramark*, No. 14-55405, 2016 WL 6583620, at *1 (9th Cir. Nov. 7, 2016) (citing *Henry v. Gill*
28 *Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993)). The court proceeds accordingly.

1 a. *Plaintiff's NRS 116.1113 and wrongful foreclosure claims*

2 Subsection (1) of NRS 38.330 states that “[u]nless otherwise provided by an agreement of
3 the parties, mediation must be completed within 60 days after the filing of the written claim.” Nev.
4 Rev. Stat. § 38.330(1). However, while NRS 38.330(1) explains the procedure for mediation, NRS
5 38.310 is clear that no civil action may be commenced “unless the action has been submitted to
6 mediation.” NRS 38.310. Specifically, NRS 38.330(1) offers in relevant part:

7 If the parties participate in mediation and an agreement is not obtained, any party
8 may commence a civil action in the proper court concerning the claim that was
9 submitted to mediation. **Any complaint filed in such an action must contain a**
10 **sworn statement indicating that the issues addressed in the complaint have**
11 **been mediated** pursuant to the provisions of NRS 38.300 to 38.360, inclusive, but
12 an agreement was not obtained.

13 Nev. Rev. Stat. § 38.330(1) (emphasis added). Moreover, nothing in NRS 38.330 provides that
14 the Nevada Real Estate Division’s (“NRED”) failure to appoint a mediator within 60 days
15 constitutes exhaustion, nor does the statute place the burden on NRED to complete mediation
16 within a specified period of time.

17 Next, under NRS 38.300(3), a civil action includes “an action for money damages or
18 equitable relief,” but not “an action in equity for injunctive relief in which there is an immediate
19 threat of irreparable harm, or an action relating to the title to residential property.” Violation of
20 NRS 116.1113 is a “civil action[] as defined in NRS 38.300.” *McKnight Family, L.L.P. v. Adept*
Mgmt., 310 P.3d 555, 558 (Nev. 2013) (finding that a claim for violation of NRS 116.1113 was
properly dismissed for lack of compliance with NRS 38.310).

21 Further, “[a] wrongful foreclosure claim challenges the authority behind the foreclosure,
22 not the foreclosure act itself.” *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev.
23 2013) (citing *Collins v. Union Fed. Sav. & Loan*, 662 P.2d 610, 623 (Nev. 1983)). “The material
24 issue in a wrongful foreclosure claim is whether ‘the trustor was in default when the power of sale
25 was exercised.’” *Turbay v. Bank of Am., N.A.*, No. 2:12–CV–1367–JCM–PAL; 2013 WL
26 1145212, at *4 (quoting *Collins*, 662 P.2d at 623). “Deciding a wrongful foreclosure claim against
27 a homeowners’ association involves interpreting covenants, conditions or restrictions applicable
28 to residential property.” *McKnight Family, L.L.P.*, 310 P.3d at 559. “This type of interpretation
falls under NRS 38.310.” *Id.* Additionally, NRS 38.310 applies to laws “contain[ing] conditions

1 and restrictions applicable to residential property.” *Id.* at 558. Therefore, plaintiff’s claim of
2 wrongful foreclosure must be mediated before this court may delve into its merits.

3 In sum, plaintiff’s claims for violation of NRS 116.1113 and unjust enrichment will be
4 dismissed as unexhausted for failure to mediate.

5 *a. Plaintiff’s claim for injunctive relief*

6 Despite plaintiff’s formulation of this request as a claim, injunctive relief is a remedy, not
7 a cause of action. *See, e.g., Ajetunmobi v. Clarion Mortg. Capital, Inc.*, 595 Fed. Appx. 680, 684
8 (9th Cir. 2014) (citation omitted). Therefore, this claim will also be dismissed.

9 *b. Declaratory relief/quiet title*

10 Plaintiff argues that BANA’s attempted tender preserved its interest and that refusal of
11 tender violates due process.² (ECF No. 37).

12 In Nevada, “[a]n action may be brought by any person against another who claims an estate
13 or interest in real property, adverse to the person bringing the action for the purpose of determining
14 such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require any particular
15 elements, but ‘each party must plead and prove his or her own claim to the property in question’
16 and a ‘plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v. Deutsche*
17 *Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (quoting *Yokeno v. Mafnas*, 973 F.2d 803,
18 808 (9th Cir. 1992)).

19 Section 116.3116(1) of the NRS gives an HOA a lien on its homeowners’ residences for
20 unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Moreover, NRS 116.3116(2) gives
21 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as
22 “[a] first security interest on the unit recorded before the date on which the assessment sought to
23 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

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27 ² As a result of the discussion below, plaintiff’s argument regarding a party’s *bona fide*
28 status is irrelevant. (ECF No. 37); *see also Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, No. 70653, 2017 WL 1423938, at *3 n.3 (citing *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1114 (Nev. 2016)).

1 The statute then carves out a partial exception to subparagraph (2)(b)'s exception for first
2 security interests. *See Nev. Rev. Stat. § 116.3116(2)*. In *SFR Investment Pool 1 v. U.S. Bank*, the
3 Nevada Supreme Court provided the following explanation:

4 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
5 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
6 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
7 charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all
8 other HOA fees or assessments, is subordinate to a first deed of trust.

9 334 P.3d 408, 411 (Nev. 2014) ("*SFR Investments*").

10 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority
11 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, "NRS 116.3116(2) provides an HOA a true
12 superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *Id.* at 419; *see*
13 *also Nev. Rev. Stat. § 116.3116(1)* (providing that "the association may foreclose its lien by sale"
14 upon compliance with the statutory notice and timing rules).

15 *1. Insufficient tender*

16 BANA did not tender the amount sent forth in the notice of default and election to sell,
17 which stated an amount due of \$5,770.00. (ECF No. 37-1). Rather, BANA tendered a lesser
18 amount, specifically, \$1,305.00. (*Id.*).

19 Under NRS 116.3116(1), the holder of a first deed of trust may pay off the superpriority
20 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.
21 *See Nev. Rev. Stat. § 116.3116(1)*; *see also SFR Investments*, 334 P.3d at 414 ("But as a junior
22 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security . . ."); *see*
23 *also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F. Supp. 2d 1142, 1149
24 (D. Nev. 2013) ("If junior lienholders want to avoid this result, they readily can preserve their
25 security interests by buying out the senior lienholder's interest." (citing *Carillo v. Valley Bank of*
26 *Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1083 (Nev.
27 1980))).

28 The superpriority lien portion, however, consists of "the last nine months of unpaid HOA
dues **and maintenance and nuisance-abatement charges**," while the subpriority piece consists of
"all other HOA fees or assessments." *SFR Investments*, 334 P.3d at 411 (emphasis added); *see*

1 *also 7912 Limbwood Ct. Trust*, 979 F. Supp. 2d at 1150 (“The superpriority lien consists only of
2 unpaid assessments and certain charges specifically identified in § 116.31162.”). BANA offered
3 \$180.00 based on its calculation of the nine months of unpaid HOA dues, without adequately
4 accounting for the maintenance and nuisance-abatement charges. *See* (ECF No. 30 at 11, 30-9 at
5 13). BANA does not provide an adequate explanation for its selectivity of inputs when calculating
6 its proposed tender value.

7 BANA merely presumed, without adequate support, that the amount set forth in the notice
8 of default included more than the superpriority lien portion and that a lesser amount based on
9 BANA’s own calculations would be sufficient to preserve its interest in the property. *See*
10 *generally, e.g.*, Nev. Rev. Stat. § 107.080 (allowing trustee’s sale under a deed of trust only when
11 a subordinate interest has failed to make good the deficiency in performance or payment for 35
12 days); Nev. Rev. Stat. § 40.430 (barring judicially ordered foreclosure sale if the deficiency is
13 made good at least 5 days prior to sale). Therefore, this argument fails.

14 There is also no “as applied” violation of due process as a result to the rejected tender. The
15 May 8, 2012, notice of default set forth an amount due of \$5,770.00. (ECF No. 37-1). Rather than
16 tendering the full amount due so as to preserve its interest in the property and then later seeking a
17 refund of any difference, BANA elected to pay a lesser amount (\$1,305.00) based on its
18 unwarranted assumption that the amount stated in the notice included more than what was due.
19 *See SFR Investments*, 334 P.3d at 418 (noting that the deed of trust holder can pay the entire lien
20 amount and then sue for a refund). Had BANA paid the amount set forth in the notice of default
21 (\$1,824.34), the HOA’s interest would have been subordinate to the first deed of trust. *See Nev.*
22 *Rev. Stat. § 116.31166(1).*

23 After BANA failed to use the legal remedies available to prevent the property from being
24 sold to a third party—for example, seeking a temporary restraining order and preliminary
25 injunction and filing a *lis pendens* on the property (*see Nev. Rev. Stat. §§ 14.010, 40.060*)—CMI
26 now seeks to profit from BANA’s failure to follow the rules set forth in the statutes. *See generally,*
27 *e.g., Barkley’s Appeal. Bentley’s Estate*, 2 Monag. 274, 277 (Pa. 1888) (“In the case before us, we
28 can see no way of giving the petitioner the equitable relief she asks without doing great injustice

1 to other innocent parties who would not have been in a position to be injured by such a decree as
2 she asks if she had applied for relief at an earlier day.”); *Nussbaumer v. Superior Court in & for*
3 *Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the complaining party has access to all the
4 facts surrounding the questioned transaction and merely makes a mistake as to the legal
5 consequences of his act, equity should normally not interfere, especially where the rights of third
6 parties might be prejudiced thereby.”).³

7 In sum, CMI’s arguments regarding BANA’s attempted tender are insufficient and
8 unpersuasive.

9 *2. Due process and NRS Chapter 116*

10 CMI next argues that the HOA lien statute is facially unconstitutional because it “did not
11 mandate notice to mortgagees prior to its recent amendment.” (ECF No. 37 at 9). CMI further
12 posits that any factual disputes regarding actual notice are irrelevant pursuant to *Bourne Valley*
13 *Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), *cert. denied*, No. 16-1208,
14 2017 WL 1300223 (U.S. June 26, 2017) (“*Bourne Valley*”); *see also* (ECF No. 30).

15 However, the Ninth Circuit actually held that NRS 116.3116’s “opt-in” notice scheme,
16 which required a HOA to alert a mortgage lender that it intended to foreclose only if the lender
17 had affirmatively requested notice, facially violated mortgage lenders’ constitutional due process
18 rights; plaintiff’s interpretation of that holding is overbroad. *Bourne Valley*, 832 F.3d at 1157–58.
19 The facially unconstitutional provision, as identified in *Bourne Valley*, exists in NRS
20 116.3116(2). *See id.* at 1158. At issue in that case was the “opt-in” provision that
21 unconstitutionally shifts the notice burden to holders of the property interest at risk. *See id.*

22 To state a procedural due process claim, a claimant must allege “(1) a deprivation of a
23 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
24 protections.” *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.
25 1998). BANA has satisfied the first element as a deed of trust is a property interest under Nevada
26 law. *See Nev. Rev. Stat. § 107.020 et seq.*; *see also Mennonite Bd. of Missions v. Adams*, 462 U.S.

27
28 ³ Alessi & Koenig explicitly warned counsel for BANA’s predecessor that it would
foreclose on the property unless the purported liability at issue was satisfied. (ECF No. 37-1).

1 791, 798 (1983) (stating that “a mortgagee possesses a substantial property interest that is
2 significantly affected by a tax sale”). However, BANA fails on the second prong.

3 Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).
4 Rather, it requires notice “reasonably calculated, under all the circumstances, to apprise interested
5 parties of the pendency of the action and afford them an opportunity to present their objections.”
6 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bourne Valley*,
7 832 F.3d at 1158.

8 Here, adequate notice was given to the interested parties prior to extinguishing a property
9 right. In fact, BANA acknowledges having received the notice of default. (ECF No. 37-1 at 40)
10 (“This letter is written in response to your Notice of Default with regard to the HOA assessments
11 purportedly owed on the above described real property”). As a result, the notice of trustee’s
12 sale was sufficient notice to cure any constitutional defect inherent in NRS 116.31163(2) as it put
13 BANA on notice that its interest was subject to pendency of action and offered all of the required
14 information. *See also Spears v. Spears*, 596 P.2d 210, 212 (Nev. 1979) (“The rule is well
15 established that one who is not prejudiced by the operation of a statute cannot question its
16 validity.”).

17 Further, CMI does not dispute that BANA received actual notice of the foreclosure sale,
18 but merely that “[a]ctual notice does not change the analysis.” (ECF No. 37 at 11). As discussed
19 above, this assertion is incorrect. *See Mullane*, 339 U.S. at 314.

20 *c. Motion to certify a question of law*

21 In the motion to certify, SFR requests that the court certify the following question to the
22 Nevada Supreme Court: “Whether NRS § 116.31168(1)’s incorporation of NRS § 107.090
23 requires homeowners’ associations to provide notices of default to banks even when a bank does
24 not request notice?” (ECF No. 50 at 2).

25 The court declines to certify this question as controlling precedent is available for guidance
26 on this issue. The Ninth Circuit, in *Bourne Valley*—which SFR cites to in its motion—expressly
27 answered this exact question in the negative. *See generally* 832 F.3d 1154. More specifically, the
28 Ninth Circuit held, in relevant part, as follows:

1 Bourne Valley argues that Nevada Revised Statute section 116.31168(1), which
2 incorporated section 107.090, mandated actual notice to mortgage lenders whose
3 rights are subordinate to a homeowners' association super priority lien. . . .
According to Bourne Valley, this incorporation of section 107.090 means that
foreclosing homeowners' associations were required to provide notice to mortgage
lenders even absent a request.

4
5 If section 116.31168(1)'s incorporation of section 107.090 were to have required
homeowners' associations to provide notice of default to mortgage lenders even
6 absent a request, section 116.31163 and section 116.31165 would have been
meaningless. We reject Bourne Valley's argument.

7 *Bourne Valley*, 832 F.3d at 1159.

8 Thus, the court will deny SFR's motion to certify this question to the Nevada Supreme
9 Court.

10 *d. SFR's motion for partial summary judgment*

11 SFR's motion for partial summary judgment urges the court to apply the "return doctrine,"
12 which would purportedly return NRS 116.31163, 116.311635, and 116.31168 to their 1991 pre-
13 amendment state because *Bourne Valley* struck those provisions as unconstitutional. (ECF No.
14 58). However, the court need not address this issue because there was actual notice to the party
15 who possessed a relevant deed of trust in the property at the time of the foreclosure process. That
16 fact renders *Bourne Valley* irrelevant to the case at hand. *See generally* 832 F.3d at 1159.

17 Therefore, to issue an opinion at this time on this issue would produce an advisory opinion,
18 which this court cannot do. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (holding that "[t]he
19 federal courts established pursuant to Article III of the Constitution do not render advisory
20 opinions"). Therefore, the court will deny SFR's motion for partial summary judgment. (ECF
21 No. 58).

22 **IV. Conclusion**

23 In sum, all motions will be denied, and CMI's claims for breach of NRS 116.1113,
24 wrongful foreclosure, and injunctive relief will be dismissed.

25 Accordingly,

26 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that CMI's motion for
27 summary judgment (ECF No. 37) be, and the same hereby is, DENIED.

1 IT IS FURTHER ORDERED that CMI's claims regarding NRS 116.1113, wrongful
2 foreclosure, and injunctive relief be, and the same hereby are, DISMISSED, without prejudice.

3 IT IS FURTHER ORDERED that SFR's motion to certify a question of law (ECF No.
4 50) be, and the same hereby is, DENIED.

5 IT IS FURTHER ORDERED that SFR's motion for partial summary judgment (ECF No.
6 58) be, and the same hereby is, DENIED.

7 DATED July 5, 2017.

8 
9 UNITED STATES DISTRICT JUDGE